

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATALIE WHITE LESSER and	:	CIVIL ACTION
HARVEY LESSER, h/w	:	
	:	
v.	:	
	:	
CARMENCITA ASERON	:	
a/k/a CARMEN ASERON	:	NO. 96-8121

MEMORANDUM AND ORDER

HUTTON, J.

March 3, 1998

Presently before this Court is the Motion by Plaintiff Harvey Lesser to Strike the New Matter Counterclaim Against Harvey Lesser (Docket No. 4) and the Plaintiffs' Motion to Strike Answer and Third Party Complaint (Docket No. 5). For the reasons stated below, the plaintiffs' Motions are **DENIED**.

I. BACKGROUND

This action for personal injuries sustained in an automobile accident in New Jersey was commenced on October 17, 1996, when the plaintiffs filed their complaint in the Court of Common Pleas of Philadelphia County. On December 6, 1996, Defendant Carmencita Aseron removed this matter to the United States District Court for the Eastern District of Pennsylvania.¹

1. The plaintiffs are residents of New Jersey, and the defendant is a Pennsylvania resident. Pls.' Compl. ¶¶ 1, 2. This case was originally brought in Pennsylvania and may have been improperly removed under 28 U.S.C. § 1441(b). However, the plaintiffs failed to raise this issue. Where improper removal by a citizen of the forum state is not raised within thirty days after the filing of the notice of removal, the error is waived. Murphy v. Richards,

"Shortly following the date of removal . . . , defendant[] did request and [was] given a verbal extension of time to answer the Complaint within a 'reasonable' time frame." Pls.' Mot. to Strike Ans. ¶ 4. However, the defendant failed to file her answer until August 1, 1997. In her answer, the defendant asserts affirmative defenses and includes a counterclaim against plaintiff Harvey Lesser. The defendant's counterclaim is made pursuant to Pennsylvania Rule of Civil Procedure 2256.²

In response, the plaintiffs have filed the instant motions, seeking to strike the defendant's answer and counterclaims. However, plaintiff Harvey Lesser did not file his Motion to Strike the New Matter Counterclaim until October 31, 1997. Moreover, the plaintiffs failed to file their Motion to Strike Answer and Third Party Complaint until November 7, 1997.

II. DISCUSSION

Federal Rule of Civil Procedure 81(c) states that a defendant in a removed action must "answer or present the other defenses or objections available under these rules within 20 days after receipt through service or otherwise of a copy of the initial pleading, then filed, or within 5 days after the filing

No.CIV.A.95-1918, 1995 WL 613112, at * 1 (E.D. Pa. Oct. 18, 1995).

2. The defendant recognizes that her counterclaim should have been made pursuant to Federal Rule of Civil Procedure 13(a). This error is insignificant to the validity of the defendant's claim for relief. Accordingly, the Court will not require that the defendant amend her answer.

of the petition for removal, whichever period is longest." The plaintiffs filed their complaint on October 17, 1996. The defendant filed her petition for removal on December 6, 1996. Thus, the defendant was required to file her answer by December 11, 1996.

The defendant clearly failed to comply with Rule 81(c) by waiting almost nine months to file an answer to the complaint, which included her affirmative defenses and counterclaims. The parties did agree in an oral stipulation that the defendant had a "reasonable" extension of time to file her answer. Pls.' Mot. to Strike ¶ 4. While the plaintiffs argue that this stipulation did not grant the defendant an additional eight and a half months to submit her answer, the plaintiffs failed to address the defendant's inactivity until October 31, 1997, three months after the defendant filed her answer.

A plaintiff served with a counterclaim in the answer to its complaint must file a reply "within 20 days after service of the answer." Fed. R. Civ. P. 12(a)(2). As stated above, the defendant finally filed her answer on August 1, 1997. The plaintiffs did not reply to the defendant's counterclaims until October 31, 1997. By waiting almost three months to reply to the defendant's answer and counterclaims, the plaintiffs failed to comply with Rule 12(a)(2).

Thus, this Court is faced with two equally blameworthy

parties. While the defendant waited almost nine months to file her answer, her conduct was somewhat excused by the oral stipulation. The plaintiffs' delay was shorter, but completely inexcusable.

Although the defendant's answer and counterclaims were untimely filed, this Court denies the plaintiffs' motions for several reasons. First, the parties' stipulation partially excused the defendant's delay. Second, the plaintiffs failed to request a default judgment, sanctions, or other relief prior to the defendant's August 1, 1997 filing. Third, the plaintiffs have not argued that they were prejudiced by the defendant's delay. Fourth, the plaintiffs themselves failed to comply with the federal rules by failing to respond to the defendant's counterclaims in a timely fashion. Finally, "[a] decision on the merits . . . is favored by this Court." New York Typographical Union No. 6 v. AA Job Printing, 622 F. Supp. 566, 567 (S.D.N.Y. 1985) (denying default judgment where answer after removal was untimely); see Gross v. Stereo Component Sys., Inc., 700 F.2d 120, 122 (3d Cir. 1983) ("as a general matter this court does not favor defaults and that in a close case doubts should be resolved in favor of setting aside the default and reaching a decision on the merits."); 99 cents Stores, Inc. v. Dynamic Distributions, No.CIV.A.97-3869, 1998 WL 24338, at * 4 (E.D. Pa. Jan. 22, 1998) (same). Accordingly, this Court denies the plaintiffs' Motion to

Strike the New Matter Counterclaim.

An appropriate Order follows.

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O R D E R

AND NOW, this 3rd day of March, 1998, upon consideration of the Motion by Plaintiff Harvey Lesser to Strike the New Matter Counterclaim Against Harvey Lesser (Docket No. 4), and the Plaintiffs' Motion to Strike Answer and Third Party Complaint (Docket No. 5), IT IS HEREBY ORDERED that the plaintiffs' Motions are **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.